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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-434

WILLIAM G. MILLIKEN, ET AL., PETITIONERS

v.

RONALD G. BRADLEY, ET AL.

No. 73-435

ALLEN PARK PUBLIC SCHOOLS, ET AL., PETITIONERS

v.

RONALD G. BRADLEY, ET AL.

No. 73-436

THE GROSSE POINTE PUBLIC SCHOOL SYSTEM, PETITIONER

v.

RONALD G. BRADLEY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has substantial responsibility under 42 U.S.C. 2000c-6, 2000d, and 2000h-2, with respect

to school desegregation. This Court's resolution of the issues presented in this case will affect that enforcement responsibility. The United States participated as an intervenor in this case in the court of appeals [1] and has participated as *amicus curiae* or as a party in most of this Court's previous school desegregation cases, including *Brown* v. *Board of Education*, 347 U.S. 483; 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Green* v. *County School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Swann* v. *Board of Education*, 402 U.S. 1; *Wright* v. *Council of City of Emporia*, 407 U.S. 451; *School Board of the City of Richmond* v. *State Board of Education*, 412 U.S. 92; *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189; and *Norwood* v. *Harrison*, 413 U.S. 455.

I

INTRODUCTORY STATEMENT

The issue in this case is whether the remedy for illegal racial segregation of the Detroit public schools may properly include a cross-district pupil assignment plan between the Detroit school district and neighboring districts, where the record does not show whether

[1] The United States intervened in the court of appeals pursuant to 28 U.S.C. 2403, because the constitutionality of an Act of Congress (Section 803 of P.L. 92-318, 86 Stat. 235, 372) had been called into question. The court of appeals found it unnecessary to consider the applicability or constitutionality of the statute in question (Pet. App. 189a), which, by its terms, expired on January 1, 1974.

constitutional violations affected the racial composition of schools outside the Detroit district and where the suburban districts have had no effective opportunity to be heard on the propriety of a metropolitan-wide remedy.

This case began in August 1970 when certain of the respondents, primarily black parents and their children who attended schools in the Detroit public school system, sued city and state officials, alleging that the officials had pursued a policy and practice of racial discrimination in the operation of the Detroit public schools, which had resulted in a racially segregated school system.[2] The plaintiffs sought, *inter alia*, an order requiring the defendants to present a plan "for the elimination of the racial identity of every school in the [Detroit] system and to maintain now and hereafter a unitary, nonracial school system" (Pet. App. 15a). The case was twice before the court of appeals on preliminary matters (433 F. 2d 897, 438 F. 2d 945), and a trial on the merits was held from April to July of 1971.

In September 1971, the district court entered its findings of fact and conclusions of law on the issue of racial segregation in the Detroit schools (Pet. App. 17a–39a). It found that the Detroit school board had engaged in official acts of racial discrimination that

[2] The complaint also alleged that a recently-adopted Act of the state legislature unconstitutionally interfered with a voluntary plan of desegregation adopted by the Detroit Board of Education (Pet. App. 8a–10a). The Act was held unconstitutional by the court of appeals in an earlier phase of this litigation (433 F. 2d 897).

had contributed to racial segregation in the school system. The board's use of optional attendance zones in areas undergoing racial transition and between schools of opposite predominant racial composition "allowed whites to escape integration" (*id.* at 25a); the board transported children on a racially discriminatory basis (*ibid.*); it gerrymandered attendance zones and altered grade structures "in a manner which has had the natural, probable and actual effect of continuing black and white pupils in racially segregated schools" (*id.* at 25a–26a); and it pursued discriminatory school construction policies (*id.* at 27a, 28a).

The court also found that official acts of state agencies contributed to the racial segregation in Detroit's schools. The enactment of state legislation rescinding a voluntary plan of desegregation that had been adopted by the Detroit board was designed, the court held, "to impede, delay and minimize racial integration in Detroit schools" (*id.* at 28a);[3] and state officials, as well as the Detroit board, participated in racially discriminatory decisions concerning school construction (*ibid.*).[4] The court also concluded that Michigan law vests in the State Board of Education "supervision over all public education" (*id.* at 36a).

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[3] The details of the statute are set forth in the opinion of the court of appeals holding it unconstitutional (433 F. 2d 897).

[4] The court also noted that state law did not provide funds or authority for the transportation of pupils in Detroit, though it did provide for transportation of some pupils attending suburban districts. The court stated that this "and other financial limitations, such as those on bonding and the working of the state aid formula whereby suburban districts were able to make far larger per pupil expenditures despite less tax

Turning to the question of an appropriate remedy for the constitutional violations, the district court addressed a pending motion by intervening defendants to join as additional parties defendant 85 school districts in the three counties surrounding Detroit, on the ground that effective relief could not be achieved without their presence (see I App. 119–129).[5] The court deferred ruling on that motion, pending the submission of proposed remedies by existing parties (Pet. App. 38a–39a). In a subsequent hearing, the court stated that "perhaps only a plan which embraces all or some of the greater Detroit metropolitan area can hope to succeed" (*id.* at 40a). It ordered the Detroit school board to submit a proposed plan for desegregation within its district and ordered the state defendants to submit a "metropolitan plan of desegregation" (*id.* at 43a).[6]

Before ruling on the plans submitted by the state and city defendants, the district court granted motions by some of the suburban school districts to intervene in the proceeding, but restricted their participation essentially to advising the court on the propriety of a metropolitan-wide remedy in general and on the merits of the par-

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effort, have created and perpetuated systematic educational inequalities" (Pet. App. 27a). The court did not indicate whether any such disparities had affected the racial composition of the school districts. Cf. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1.

[5] "App." refers to the five-volume joint appendix, each volume of which is separately paginated.

[6] The court of appeals held that this order was not appealable (468 F. 2d 902), and this Court denied certiorari (409 U.S. 844).

ticular desegregation plan submitted to the court (I App. 204–207).

The district court thereafter issued the three rulings that were principally at issue in the court of appeals.

(1) On March 24, 1972, in its ruling on the propriety of considering a metropolitan-wide remedy (Pet. App. 48a–52a), the district court addressed the question whether it could "consider relief in the form of a metropolitan plan, encompassing not only the City of Detroit, but the larger Detroit metropolitan area" (*id.* at 49a). It rejected both the state defendants' argument that no state action caused the segregation of the Detroit schools, and the suburban districts' contention that interdistrict relief is inappropriate unless the suburban districts have themselves committed violations. The court concluded (*id.* at 51a):

> [I]t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plans before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation.

(2) On March 28, 1972, the court issued its findings and conclusions on the three "Detroit-only" plans submitted by the city board and the plaintiffs (*id.* at 53a–58a). It found that the best of the three plans "would make the Detroit system more identifiably Black * * * thereby increasing the flights of Whites

from the city and the system" (*id.* at 55a). From this the court concluded that the plan "would not accomplish desegregation" and that desegregation "cannot be accomplished within the corporate geographical limits of the city" (*id.* at 56a). It accordingly held that it "must look beyond the limits of the Detroit school district for a solution to the problem of segregation" (*id.* at 57a). Relying on *Bradley* v. *School Board of the City of Richmond, Virginia,* 338 F. Supp. 67 (E.D. Va.), reversed, 462 F. 2d 1058 (C.A. 4), affirmed by an equally divided Court, 412 U.S. 92, the court held that "[s]chool district lines are simply matters of political convenience and may not be used to deny constitutional rights" (Pet. App. 57a).

(3) On June 14, 1972, the district court issued a ruling on the desegregation area (*id.* at 97a–105a) and related findings and conclusions (*id.* at 59a–96a). The court acknowledged at the outset that it had "taken no proofs with respect to the establishment of the boundaries of the 86 public school districts in the counties [in the Detroit area], nor on the issue of whether, with the exclusion of the city of Detroit school district, such school districts have committed acts of de jure segregation" (*id.* at 60a). Nevertheless, it designated 53 of the suburban school districts plus Detroit as the "desegregation area" (*id.* at 101a) and appointed a panel to prepare and submit "an effective desegregation plan" for the Detroit schools that would encompass the entire desegregation area (*id.* at 99a). The plan was to be based on 15 clusters, each containing part of the Detroit system and two or more suburban districts (V App. 111–115), and was to "achieve the

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greatest degree of actual desegregation to the end that, upon implementation, no school, grade or classroom [be] substantially disproportionate to the overall pupil racial composition" (Pet. App. 101a–102a).

A divided court of appeals, sitting *en banc*, affirmed in part, vacated in part, and remanded for further proceedings (Pet. App. 110a–240a).[7] The court held, first, that the record supports the district court's findings on the constitutional violations committed by the Detroit board (*id.* at 118a–151a) and by the state defendants (*id.* at 151a–157a).[8] It stated that

[7] The district court had certified most of the foregoing rulings for interlocutory review pursuant to 28 U.S.C. 1292(b) (I App. 265–266), and a panel of the court of appeals had granted leave to appeal (Pet. App. 108a–109a). The case was initially decided on the merits by a panel, but the panel's opinion and judgment were vacated when the court determined to rehear the case *en banc* (see Pet. App. 111a–112a).

[8] With respect to the State's violations, the court of appeals held: (1) that, since the city board is an instrumentality of the State and subordinate to the state board, the segregative actions of the Detroit board "are the actions of an agency of the State" (Pet. App. 151a); (2) that the state legislation rescinding Detroit's voluntary desegregation plan (see p. 4, *supra*) contributed to increasing segregation in the Detroit hools (*ibid.*); (3) that under state law prior to 1962 the state ard had authority over school construction plans and must erefore be held responsible "for the segregative results" (*ibid.*); (4) that the "State statutory scheme of support of transportation for school children directly discriminated against Detroit" (*id.* at 154a) by not providing transportation funds to Detroit on the same basis as funds were provided to suburban districts (*id.* at 151a); and (5) that the transportation of black students from one suburban district to a black school in Detroit must have had the "approval, tacit or express, of the State Board of Education" (*id.* at 152a).

the acts of racial discrimination shown in the record are "causally related to the substantial amount of segregation found in the Detroit school system" (*id.* at 157a), and that "the District Court was therefore authorized and required to take effective measures to desegregate the Detroit Public School System" (*id.* at 158a).

The court of appeals also agreed with the district court that "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area" (*id.* at 163a–164a). It stated that it could "not see how such segregation can be any less harmful to the minority students than if the same result were accomplished within one school district" (*id.* at 164a).

The court of appeals accordingly concluded that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan" (*id.* at 172a). It reasoned that such a plan would be appropriate because of the State's violations, and could be implemented because of the State's authority to control local school districts. "[T]he State has committed de jure acts of segregation and * * * the State controls the instrumentalities whose action is necessary to remedy the harmful effects of the State acts" (*ibid.*). An inter-

district remedy is thus "within the equity powers of the District Court" (*id.* at 173a).[9]

The court of appeals expressed no views on the propriety of the district court's "desegregation area." It held that all suburban school districts that might be affected by any metropolitan-wide remedy should be made parties to the case on remand and be given an opportunity to be heard with respect to the scope and implementation of such a remedy (*id.* at 177a). Under the terms of the remand, however, the district court need not receive further evidence on the issue of segregation in the Detroit schools or on the propriety of a Detroit-only remedy (*id.* at 178a).

It is our view that the remedy for unconstitutional segregation of the public schools in a school district can properly extend beyond the boundaries of the district only where the violation has directly altered or substantially affected the racial composition of schools outside the district and only to the extent necessary to eliminate the segregative effects of the violation. Where the schools of only one district have been affected, there is no constitutional requirement that the relief include a balancing of the racial composition of that district's schools with those of surrounding districts.

The record does not support the ruling of the court

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[9] The court sought to distinguish *Bradley* v. *School Board of the City of Richmond, Virginia*, 462 F. 2d 1058 (C.A. 4), affirmed by an equally divided Court, 412 U.S. 92, on the grounds that the district court in that case had ordered an actual consolidation of three school districts and that Virginia's constitution and statutes, unlike Michigan's gave the local boards exclusive power to operate the public schools (Pet. App. 175a).

of appeals that a metropolitan-wide remedy is appropriate to cure the violations found in this case, virtually all of which affected only the schools in the Detroit system. The case should be remanded to permit all the parties, many of whom have not yet been heard in the district court, to present evidence and argument on the existence of any constitutional violations that have directly altered or substantially affected the racial composition of schools outside Detroit, and on the appropriate remedy for any such violation.

II

THE REMEDY FOR UNCONSTITUTIONAL SCHOOL SEGREGATION MAY EXTEND BEYOND THE BOUNDARIES OF A SINGLE DISTRICT ONLY IF, AND TO THE EXTENT THAT, THE VIOLATION HAS DIRECTLY ALTERED OR SUBSTANTIALLY AFFECTED THE RACIAL COMPOSITION OF SCHOOLS IN MORE THAN ONE DISTRICT

This Court held in *Swann* v. *Board of Education*, 402 U.S. 1, 16, that the task in fashioning school desegregation relief "is to correct * * * the condition that offends the Constitution." It follows that "the nature of the violation determines the scope of the remedy" (*ibid.*).

The mere co-existence, within a State, of adjacent school districts having disparate racial compositions is not itself a constitutional violation. *Spencer* v. *Kugler*, 404 U.S. 1027, affirming 326 F. Supp. 1235 (D. N.J.).[10] As Solicitor General Griswold explained

[10] In *Spencer* this Court affirmed the district court's decision that, at least in States not recently operating dual school systems, extreme racial imbalance, without more, does not authorize—let alone require—the court to revise neutrally established school district lines.

last Term in the Memorandum for the United States as Amicus Curiae in *School Board of the City of Richmond, Virginia* v. *State Board of Education* (No. 72-549), *supra*, at pp. 13–15 (footnote omitted):

> In determining that one school system for the entire region should be created, the district court relied upon (Pet. App. 187a) this Court's statement in *Swann, supra*, 402 U.S. at 26, that for remedial purposes, there is "a presumption against schools that are substantially disproportionate in their racial composition." But disproportionate in relation to what? Surely not to some absolute standard, for the Constitution does not establish any fixed ratio of black students to white students that must be achieved. Instead, whether a particular school is racially imbalanced or identifiable can be determined only by comparing it with "the racial composition of the whole school system." *Swann* v. *Board of Education, supra*, 402 U.S. at 25; see also *id.* at 24.
>
> Thus, the question whether, for example, an elementary school having a student body 70 percent black and 30 percent white is racially imbalanced or has a substantially disproportionate racial composition is in itself unanswerable. Some frame of reference is needed and, as *Swann* indicates, the proper comparison (to the extent that racial balance is relevant) is with the racial composition of the population in the school system operating the particular school since the purpose is to ensure complete elimination of the dual system by having one set of schools for both blacks and whites. And under *Swann* there would be no presumption against schools, such as the one in the example above, if

these schools reflected the black-white ratio of the entire school system. 402 U.S. at 25–26.

Why then would there be a presumption against the school system itself with the same 70:30 ratio of blacks to whites, as the district court concluded here with respect to the school system of the City of Richmond? (Pet. App. 186a–188a.) Stated differently, on what basis could the district court conclude that its remedy should reach outside the school system of the City of Richmond? Apparently, the court believed that it must look beyond the Richmond system in fashioning relief because the City school system is racially disproportionate or imbalanced in relation to the adjacent County school systems, thereby resulting in racial identifiability of the three systems (*e.g.*, Pet. App. 185a–187a, 230a, 237a–238a). But the court had to look beyond the Richmond system and compare it with the surrounding Counties in the first place in order to determine whether the Richmond system is racially imbalanced in comparison with the adjacent systems. This is not only circular as a reason for fashioning relief beyond the Richmond system, but also heedless of the extent of the constitutional violation being remedied.

Thus, in our view, an interdistrict remedy, requiring the restructuring of state or local government entities, is appropriate only in the unusual circumstance where it is necessary to undo the interdistrict effect of a constitutional violation. Specifically, if it were shown that the racially discriminatory acts of the State, or of several local school districts, or of a single local district, have been a direct or substantial cause of interdistrict

school segregation, then a remedy designed to eliminate the segregation so caused would be appropriate.

One example of circumstances warranting interdistrict relief is where one or more school systems have been created and maintained for members of one race. See, *e.g.*, *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Texas), affirmed, 447 F. 2d 441 (C.A. 5), certiorari denied *sub nom. Edgar* v. *United States*, 404 U.S. 1016; *Haney* v. *County Board of Education of Sevier County*, 429 F. 2d 364 (C.A. 8). Similarly, where the boundaries separating districts have been drawn on account of race, an interdistrict remedy is appropriate. See, *e.g.*, *United States* v. *Missouri*, 363 F. Supp. 739 (E.D. Mo.).[11] Some form of interdistrict relief may also be appropriate where pupils have been transferred across district lines on a racially discriminatory basis.

In each instance of an interdistrict violation, the remedy should, in accordance with traditional principles of equity and the law of remedies, be tailored to fit the violation, particularly in view of the deference owed to existing governmental structures. See, *e.g.*, *Bradley* v. *School Board of the City of Richmond, Virginia*, *supra*, 462 F. 2d at 1067–1069; cf. *Wright* v. *Council of City of Emporia*, *supra*, 407 U.S. at 478 (Burger, C.J., dissenting). Any modification of those structures

[11] Cf. *Wright* v. *Council of City of Emporia*, 407 U.S. 451; *United States* v. *Scotland Neck Board of Education*, 407 U.S. 484. In those cases, this Court held that an "attempt by state or local officials to carve out a new school district from an existing district that is in the process of dismantling a dual school system" may be enjoined by the district court if it would impede the dismantling of the dual system (*id.* at 489).

should be narrowly framed to eliminate the interdistrict segregation that has been caused by the particular violation, so as to avoid unnecessary judicial interference with state prerogatives concerning the organization of local governments. Thus, a single instance of discriminatory cross-district transfers between only two school districts (see pp. 19–20, *infra*) would not warrant the kind of metropolitan-wide interdistrict remedy involving 54 districts that the courts below contemplate here. The appropriate relief should be limited to correcting the segregative conditions caused by the transfers.[13]

III

THE RECORD IN THIS CASE DOES NOT SUPPORT THE BROAD METROPOLITAN-WIDE REMEDY CONTEMPLATED BY THE COURT OF APPEALS

This Court does not have before it a final order adopting a particular plan of desegregation. It is reviewing, instead, a general determination that the segregation of the Detroit public schools shown on this record warrants an interdistrict remedy potentially embracing much or all of the 86-district metropolitan

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[13] Moreover, even a finding of some interdistrict violations would not mean that extensive interdistrict bussing should be required as a remedy regardless of its disruptive effects or other costs. This Court specifically stated in *Swann* that "[a]n objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process" (402 U.S. at 30–31), and it indicated that in remedying school segregation the courts should engage in the process of informed "reconciliation of competing values" that "courts of equity have traditionally employed" (402 U.S. at 31).

area. In our view, the record does not support such a remedy, because it does not show that the constitutional violations have directly altered or substantially affected the racial composition of schools in districts outside of Detroit.

Neither the district court nor the court of appeals predicated its conclusion concerning the propriety of a metropolitan-wide remedy on the existence of any violation caused by or affecting more than one district. There is, first of all, no finding that any school district other than Detroit has engaged in racial discrimination: the district court specified that it had taken no evidence on whether the suburban districts "have committed acts of de jure segregation" (Pet. App. 60a). Nor is there any proof that state or local officials gerrymandered district lines for purposes of racial discrimination. On this point, too, the district court took no evidence (*ibid.*).

The district court found—and the court of appeals upheld the findings—that the Detroit school board had committed unlawful acts of discrimination causing substantial racial segregation in the Detroit schools and that the state defendants had also committed violations contributing to the segregation in those schools (*id.* at 118a–157a; see *id.* at 24a–28a, 33a–38a). But the record thus far does not establish any basis for concluding that the state or city violations have directly altered or substantially affected the racial composition of schools outside Detroit.

The district court, in its September 27, 1971, ruling on the issue of segregation, considered "the present racial complexion of the City of Detroit and its

public school system" in light of "what has happened in the last half century" in the Detroit metropolitan area (Pet. App. 19a). In the course of that general historical review, the court stated (*id.* at 23a): "Governmental actions and inaction at all levels, federal, state, and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area." While the court also noted that "there is an interaction between residential patterns and racial composition of the schools" (*id.* at 24a), its findings of constitutional violations and racial segregation in the schools were limited to "the Detroit school system" (*ibid.*).[13] It did not find that any suburban school segregation was caused by any state or local acts of *de jure* racial discrimination.

Similarly, the court of appeals concluded that the discriminatory practices of the state and city defendants are "causally related to the substantial amount of segregation found *in the Detroit school system*" (*id.* at 157a; emphasis added) and that the district court was required "to desegregate *the Detroit Public School System*" (*id.* at 158a; emphasis added).[14] The

[13] The district court's conclusions were that "[t]he public schools *operated by defendant Board* are * * * segregated on a racial basis" (Pet. App. 26a; emphasis added) and that the State and the Detroit board "have committed acts which have been causal factors in the segregated condition of the *public schools of the City of Detroit*" (*id.* at 33a; emphasis added).

[14] The decision of the court of appeals dealt at some length with the question of violations within the city of Detroit (see Pet. App. 118a–151a). Although one of the petitioners appears

court of appeals also stated, however, that "the State has been guilty of discrimination which had the effect of creating and maintaining racial segregation along school district lines" (*id.* at 172a). That statement appears in the section of the court's opinion relating to the propriety of an interdistrict remedy in circumstances where a Detroit-only remedy would lead to an overwhelmingly black city school system. The statement is followed by a reference to an earlier section of the opinion concerning the violations committed by the State (*id.* at 151a–157a). The earlier section itself, however, cites only one instance of a possible interdistrict violation.

As we indicated above [redacted] (p. 8, n. 8, *supra*), the court of appeals found that the State committed five constitutional violations. With respect to four of those violations, there is nothing to indicate that any of them affected the racial character of schools outside the Detroit system. First, the court held that the State was derivatively responsible for the Detroit board's violations (Pet. App. 151a), but, so far as this record shows, those violations themselves affected only the schools within the Detroit district. Second, the State's legislative interference with Detroit's voluntary desegregation plan contributed, in the court's words, only to "segregation of the Detroit school system"

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now to challenge the affirmance by the court of appeals of the findings concerning intra-Detroit violations (see Brief for Petitioner in 73–436, pp. 15–18), the correctness of that aspect of the decision was not questioned in any of the petitions. In any event, this aspect of the decisions below appears consistent with this Court's decision last Term in *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. [illegible]

(*ibid.*). Third, the court held that the State's authority to supervise school site selection and to approve building construction plans means that the State is responsible for "the segregative results" of "Detroit's school construction program" (*ibid.*); again, there is no basis for concluding that Detroit's construction program affected suburban districts.[15] Fourth, there is no indication in the record or in the opinions below how, if at all, the availability of state-financed transportation for some Michigan students outside Detroit but not within Detroit (*ibid.*) might have affected the racial character of *any* of the State's school districts.

The fifth violation that the court of appeals attributed to the State is the only one that can be said, on the present record, to have had some interdistrict racial impact. In one instance, the suburban Carver school district arranged by contract to have its black high school students educated in a predominantly black Detroit high school, because "no white suburban district (or white school in the city) would take the children" (Pet. App. 137a). The court of appeals stated that this cross-district transportation "could not have taken place without the approval, tacit or express, of the State Board of Education" (*id.* at 152a). Of course, such an arrangement between the Carver and Detroit school boards was state

[15] The court of appeals asserted that, "as was pointed out above, the State approved school construction which fostered segregation throughout the Detroit metropolitan area" (Pet. App. 157a). But its only reference is to an earlier section of the opinion that relates to the segregative impact in *Detroit* of the school construction program in that district (*id.* at 144a–151a).

action which may have amounted to unconstitutional racial segregation,[16] regardless of whether the State Board participated in it. But the appropriate remedy would be one tailored to fit that possible violation—also regardless of State Board participation—since such participation would not change the nature or consequences of the violation. An isolated instance of cross-district transfers on account of race between only two school districts (and possibly involving refusals for racial reasons by schools in one or a small number of other districts to accept the transferred students) cannot, as a matter of equity, support a metropolitan-wide interdistrict remedy involving 54 or more school systems.

Indeed, neither the district court nor the court of appeals predicated its holding on the existence of a violation affecting the racial composition of the suburban districts. The district court determined that a metropolitan-wide remedy would be appropriate to desegregate the Detroit schools, because it concluded that any effective plan limited to Detroit "would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation" (Pet. App. 56a). The court of appeals reached the same conclusion: "[A]ny Detroit only desegregation plan will lead directly to a single segregated Detroit school district overwhelmingly black in all of its schools" (*id.* at 172a–173a). Such a remedy "cannot correct the constitutional violations herein found" (*id.* at 173a).

The prediction that massive "white flight" will result from an effective intra-Detroit desegregation

[16] See Pet. App. 96a, 137a–139a; II App. 109–111, 131.

plan is inherently speculative, and in any event does not change the nature of the violation to be remedied. For that reason, such a prediction does not in itself warrant interdistrict relief. On this aspect of the case, also, we adhere to the following views stated last Term by Solicitor General Griswold in response to a similar prediction by the district court in the *Richmond* case (Memorandum for the United States as Amicus Curiae, *supra*, pp. 17–20; footnotes omitted or renumbered):

> The district court also believed that the school system of the City of Richmond could not become a unitary system within its boundaries because a "viable racial mix" would not be possible in light of the racial composition of Richmond's population (Pet. App. 207a, 420a, 519a; see, *e.g.*, *id.* at 201a, 230a, 237a–238a, 436a–442a, 444a). The court pointed to evidence that the current proportion of blacks to whites in the Richmond school system has resulted in whites leaving Richmond's public schools and that unless the trend were reversed, the City's schools might become all black.
>
> The duty of the district court in this case was to ensure that the Richmond school system converted to a unitary system. And as we have discussed, see pp. 11–17, *supra*, as long as the school authorities operate just schools instead of one set of schools for blacks and another for whites, it matters not at all whether the system has more black students than white students or vice-versa. The schools of Vermont are not segregated even though most of them are all white. Under the district court's theory and its consolidation order, which would reverse the racial

composition of the Richmond schools from majority black to majority white, the apparent goal is to have a school system with substantially more white children than black children. But the Fourteenth Amendment does not prefer predominantly white school systems over predominantly black school systems and it does not sanction the district court's transforming its preference in this regard into a constitutional command.

We of course agree that the federal courts have wide discretion to bring about unitary school systems. But as Chief Justice Marshall stated long ago, to say that the matter is within a court's discretion means that it is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[17] The purpose of a court-ordered remedy in these cases is to cure the violation, to correct "the condition that offends the Constitution." *Swann* v. *Board of Education, supra,* 402 U.S. at 16. Yet here the district court, instead of ordering relief within the bounds of Richmond's constitutional violation, went far beyond in the hope of forestalling the result of a possible migration of whites from the City, a result not in itself unconstitutional but thought by the district court to be undesirable.

If a certain desegregation plan would become ineffective shortly after implementation this is certainly something the district court should consider. Surely it would have been proper in this case for the district court to seek a remedy within the Richmond system that promised

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[17] *United States* v. *Burr*, 25 Fed. Cas. 30, 35 (No. 14,692d, 1807).

> maximum stability. But the desire to preserve the existing racial character of the City of Richmond or of its school system is not of constitutional dimensions and does not warrant including within the scope of relief other school systems that are uninvolved in Richmond's violation. Petitioners may prefer a consolidated school system with a large, stable white enrollment; the Constitution does not.

Indeed, even in the context of relief within a single district, this Court clearly indicated in *Swann* (402 U.S. at 31–32) that the proper remedy in school desegregation cases does not include pursuit of demographic changes. When the violations found have been cured, "[t]he [school] systems would then be 'unitary' * * *" (402 U.S. at 31), and "in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary" (402 U.S. at 32). Obviously, there is even less reason to extend the remedy across district lines on the basis of demographic differences (in the absence of interdistrict violation).

Nor, in our view, do the district court's general remarks about housing discrimination (*supra*, p. 17), on which its present decision apparently was not based, provide a proper foundation for the interdistrict relief contemplated by the courts below. Indeed, more specific evidence and findings of housing and other collateral discrimination were relied upon last Term in the *Richmond* case, and we adhere, on this point

as well, to the views stated in the Memorandum for the United States as Amicus Curiae in that case (pp. 23–26; footnotes renumbered).

Petitioners rely primarily on evidence of housing discrimination and of various kinds of either intrasystem or state-wide racial discrimination to overcome this presumption.[18] The housing pattern in the Richmond metropolitan area is similar to that found in most metropolitan areas of this country. The inner city has a large black population and the surrounding suburbs are primarily white. While the causes of this housing pattern are manifold, the court of appeals accepted the contention "that within the City of Richmond there has been state (also federal) action tending to perpetuate apartheid of the races in ghetto patterns throughout the city, and that there has been state action within the adjoining counties also tending to restrict and control the housing location of black residents" (Pet. App. 572a).

Other acts cited as establishing an inter-system violation are Virginia's "massive resistance" campaign against school desegregation (Pet. App. 313), various types of delaying actions undertaken to resist desegregation of the Richmond schools (Pet. App. 189a), actions by state officials tending to reinforce racism (Pet. App. 189a), construction of racially identifiable schools after *Brown I* (Pet. App. 287a), discrimination in public employment in Henrico and Chesterfield Counties (Pet. App. 510a),

[18] They also mention past instances of transportation of black students across school division lines in the State in order to perpetuate state-enforced segregation of schools (Pet. App. 360a; cf. *id.* at 388a). * * *

lack of public transportation for poor persons (Pet. App. 514a), past state restrictions on inter-racial contacts of various kinds,[19] and state approval of school construction sites without regard to the impact on school desegregation (Pet. App. 206a).

Such acts are a shameful part of our history, and the Nation has in recent years enacted laws to remedy many of them. See, *e.g.*, 42 U.S.C. 1973 (voting), 2000e (employment), and 3601–3619 (housing). See also the Virginia Fair Housing Law, enacted in 1972, Code of Virginia, Title 36, Chapter 5. But even if some or all of these acts, including participation in residential housing discrimination, have contributed in some degree to the present racial composition of the public schools in the three school systems within the metropolitan Richmond area, the question remains whether there is a sufficiently proximate and substantially causal relationship to the racial disparity between school systems to warrant a conclusion that state-enforced racial discrimination in the public schools has resulted.[20]

Racial discrimination in such areas as housing, employment, and public expenditures are

[19] See, *e.g.*, *Boynton* v. *Virginia*, 364 U.S. 454; *Loving* v. *Virginia*, 388 U.S. 1; *NAACP* v. *Button*, 371 U.S. 415.

[20] The past existence of state-imposed discrimination, including school segregation, might, for example, also have contributed in some degree to decisions by individuals to discriminate in their social relationships, but this does not in itself necessarily convert what would otherwise be private discrimination into state action. Compare *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, and *Evans* v. *Abney*, 396 U.S. 435, with *Lombard* v. *Louisiana*, 373 U.S. 267, *Robinson* v. *Florida*, 378 U.S. 153, and *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715.

serious problems that must be attacked directly so that they can be eliminated from our society. But as this Court said in *Swann, supra*, 402 U.S. at 22–23:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope although desegregation of schools ultimately will have impact on other forms of discrimination.

We therefore conclude that the record in the present case does not warrant the fashioning of a metropolitan-wide remedy. We recognize, however, that, for practical purposes, the record was made at a time when only an intra-Detroit remedy was sought (see Pet. App. 13a–15a) and when many of the suburban school districts were not parties. We submit that the appropriate disposition in these circumstances is to remand the case to the district court with instructions to join as parties all the school districts in the three-county metropolitan area. The district court should take evidence and make findings of fact concerning any constitutional violations involving the suburban districts and any interdistrict racially segregatory impact of the Detroit violations. If no such violation or impact is shown, relief should be limited to Detroit. If any such violation or impact is shown, the district court should, after considering the evidence and argu-

ment of all affected school districts, fashion appropriate relief to remedy the particular violations found.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and the case should be remanded for further proceedings in accordance with the principles stated herein.

Respectfully submitted.

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